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INSURANCE DEPARTMENT

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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
: Sections of the Insurance Department
: Act of 1921, P.L. 789, No. 285, *as*
: *amended* (40 P.S. §§ 310.11(2),(4), (7)
: and (20); 40 P.S. § 625-3)
: Respondent :
: :
: Docket No. SC10-08-013

ADJUDICATION AND ORDER

AND NOW, this 13th day of January, 2011, Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department (Department) filed an Order to Show Cause (OTSC) on August 27, 2010 directed to Jay A. Cohen (Mr. Cohen or the respondent). The OTSC alleged that Mr. Cohen violated the Insurance Department Act.¹ Specifically, the Department alleged that Mr. Cohen, a licensed insurance agent, violated the prohibitions against unfair financial planning practices. The OTSC also charged that Mr. Cohen misappropriated the funds he collected by charging fees to clients who participated in a tuition rewards program which was designed to be offered at no cost to clients. Additionally, the OTSC charged that all these actions lead to

¹ Act of May 17, 1921, P.L. 789, No 285, *as amended* 40 P.S. § 310.11; 40 P.S. § 625-3.

DATE MAILED: January 13, 2011

the conclusion that Mr. Cohen demonstrated a lack of general fitness, competence, trustworthiness or reliability for doing business in Pennsylvania.

The OTSC advised Mr. Cohen to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised him that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The respondent was advised to set forth the facts and state concisely the matters of law upon which he relies. He further was advised of the consequences of failing to answer the OTSC.

The OTSC was served by certified and first class mail to Mr. Cohen's last known home address as kept on file in the Department. When both the certified and first class mailings were returned to the Department as undeliverable, the Department sent the OTSC again by certified and first class mail to the respondent's current address as reflected in public records. [Motion for Default Judgment ¶ 9]. Mr. Cohen signed the certified mail receipt indicating receipt of the OTSC at 5555 Collins Ave., 12H, Miami Beach, FL 33140 on November 1, 2010. [Motion for Default Judgment ¶ 12]. Mr. Cohen failed to answer the Department's Order to Show Cause within the required time.

On November 30, 2010, the Department filed a motion for default judgment and served Mr. Cohen in accordance with 1 Pa. Code Chapter 33. According to the certificate of service attached to the motion, it was served on Mr. Cohen at the same address where he accepted service of the OTSC. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This adjudication and order addresses the motion for default judgment and the order to show cause. Factual findings and some legal conclusions are contained within the body of this adjudication.

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since Mr. Cohen failed to answer the order to show cause or motion for default judgment. The order to show cause and motion advised as to the consequences of the failure to respond;² however, because of the language in the penalty provisions of applicable statutes, an analysis of the Commissioner's ability to impose penalties absent an evidentiary hearing is required.

There are no factual disputes in the present matter. All factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37.

Under general rules of administrative procedure, a final order may be entered without hearing for an insufficient answer to the OTSC unless otherwise provided by statute. *See* 1 Pa. Code § 35.37 ("Mere general denials . . . will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings."). A respondent failing to file an answer within the time allowed shall be deemed in default. *Id.* Department regulations do not limit the Commissioner's ability to order a default judgment without a hearing, so any limitation must come, if at all, from a statute.

In order for an adjudication by a Commonwealth agency to be valid, a party must have a "reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statutory provisions specifically applicable

² The OTSC warned the respondent that failure to answer in writing would result in the factual allegations being deemed admitted and that the Commissioner could enter an order imposing penalties.

to the present case³ provide for a hearing procedure prior to certain penalties being imposed by the Commissioner. See 40 P.S. § 310.91 and 40 P.S. § 625-10.⁴ However, given that the respondent has not answered the order to show cause and given current caselaw, these hearing procedures are inapplicable.

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Insurance Department Act, the caselaw supports such power. For example, in *United Healthcare Benefits Trust v. Insurance Commissioner*, 620 A.2d 81 (Pa. Cmwlth. 1993), the Court affirmed the Commissioner's grant of summary judgment for civil penalties despite the language contained in the applicable statutes which seemed to require a hearing.

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an order to show cause). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at

³ Insurance Department Act, Act of May 17, 1921, P.L. 789, No. 285 as amended by the Act of December 3, 2002, Act. No. 147 (40 P.S. §§ 310.1 *et seq.*).

⁴ The Insurance Department Act at section 310.91 mandates written notice of the nature of the alleged violations and requires that a hearing be fixed at least ten (10) days thereafter, and further provides that:

After the hearing or failure of the person to appear at the hearing, if a violation of this act is found, the commissioner may, in addition to any penalty which may be imposed by a court, impose any combination" of the following deemed appropriate: . . .

40 P.S. § 310.91. This Section then lists available penalties. Additionally, section 625-10, applicable to Count One of the OTSC, provides that "any action or adjudication of the Commissioner under this section shall be preceded by a hearing." 40 P.S. § 625-10. This section also lists available penalties.

hearing.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the order to show cause and a motion for default judgment. See *In re Crimboli*, SC99-04-015 (1999); *In re Young*, SC98-08-027 (2000); *In re Jennings*, SC99-10-001 (2001); *In re Warner*, SC01-08-001 (2002); *In re Czmus*, SC09-05-009 (2009). The Commissioner adopts this reasoning in the present case: the important aspects of 2 Pa.C.S. § 504 are notice and the *opportunity* to be heard. Default judgment is appropriate, despite language in applicable statutes which seems to require a hearing, when a respondent fails to take advantage of his opportunity to be heard. When a respondent in an enforcement action is served with an order to show cause detailing the nature of the charges against him as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

Additionally, there are no factual matters to address at a hearing. Since the factual allegations of the OTSC are deemed admitted, the determination by the Commissioner is a legal rather than a factual one. A hearing is not necessary for this type of determination. See *Mellinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987); *United Healthcare, supra*. The Commissioner adjudicates the present case based upon the undisputed, admitted facts as alleged in the OTSC.

The facts include that Mr. Cohen is a licensed insurance producer in Pennsylvania. [OTSC ¶ 2]. For an unspecified amount of time he offered services described in promotional materials as non-legal, financial and estate planning services to senior citizens through an agency doing business as "Senior Estate and Financial Services

USA.” [OTSC ¶ 3; Exhibit B]. The agency located in Wayne, Pennsylvania is not registered with the Pennsylvania Department of State and is not licensed by the Pennsylvania Insurance Department. [OTSC ¶¶ 3–4].

Mr. Cohen held himself out as a certified senior advisor (CSA) “accredited” as a participant and member of the Society of Certified Senior Advisors, Inc., located in Denver, Colorado. [OTSC ¶ 5; Exhibit C]. According to a promotional brochure describing his services, Mr. Cohen was required to meet certain standards of ethics and professional responsibility as a CSA, including competence, honesty, and trustworthiness. [Exhibit C]. Mr. Cohen also advertised his services as president of an entity called Seniors of Today and Tomorrow, Inc. (Seniors Today) which is not registered with the Department of State or licensed as a business entity by the Insurance Department. [OTSC ¶ 6; Exhibit D]. Mr. Cohen and Seniors Today collaborated with the law offices of Brett B. Weinstein, Esquire, offering to provide an “Estate Program” ultimately establishing revocable living trusts. Promotional materials outlined the supposed benefits of such trusts and the estate services offered by Mr. Cohen, Seniors Today and Mr. Weinstein. [OTSC ¶¶ 6–7; Exhibits B–D].

In 2007 at least three of Mr. Cohen’s existing insurance clients signed agreements to engage his financial planning services. [OTSC ¶ 8; Exhibits E–F]. Mr. Cohen received payment from his clients for these estate and financial planning services and preparation of estate documents. [OTSC ¶¶ 9–20]. He also collected commissions for the insurance products he sold during the course of his dealings with these clients. [OTSC ¶¶ 9–20]. He did not disclose to these clients his status as an insurance salesperson prior to their execution of the engagement agreements. [OTSC ¶ 32]. Nor did he disclose that he received commissions for the insurance products he sold in addition to the fees he collected for financial planning services. [*Id.*].

In late 2007 Mr. Cohen entered into a Facilitation Agreement with Sage Scholars, Inc. to offer tuition reward points to its clients. [OTSC ¶ 21; Exhibit G]. This agreement prohibited the sale of the tuition reward points. [*Id.*]. Despite this agreement, Mr. Cohen obtained payment from his clients for enrolling them in the Sage Scholars Inc. program. [OTSC ¶¶ 23–27; Exhibit H].

For these activities, the Insurance Department charges Mr. Cohen with five violations of the Insurance Department Act:

1) violating 40 P.S. § 625-3 by failing to disclose to his clients prior to the signing of an agreement or solicitation of the sale of a product that he was an insurance salesperson and that he received a commission for the sale of an insurance product apart from collecting a fee for financial planning and failing to include required disclosures in the written agreements his clients signed when engaging Mr. Cohen's services;

2) violating 40 P.S. § 310.11(2) which prohibits producers from violating the insurance laws of Pennsylvania;

3) violating 40 P.S. § 310.11(4) by misappropriating money received in the course of doing business;

4) violating 40 P.S. § 310.11(7) by using fraudulent, coercive or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of doing business; and

5) violating 40 P.S. § 310.11(20) by demonstrating a lack of general fitness, competence or reliability sufficient to satisfy the Department that he is worthy of licensure.

For the charges contained in Count One, the Commissioner has authority to impose remedial action against the respondent, including a cease and desist order as well as a monetary penalty of no more than \$5,000.00 per violation. These sanctions may be imposed in addition to any other remedies or penalties authorized by any other statute.

40 P.S. 625-10. For the charges contained in Counts Two through Five, the Commissioner has authority to impose remedial action against Mr. Cohen including a cease and desist order, suspension or revocation of a certificate of qualification or license as well as imposing a penalty of up to \$5,000.00 per violation. 40 P.S. § 310.91. This section also authorizes the Commissioner to impose any other appropriate condition. [Id].

In the present case, the admitted facts support sanctions for the charges against the respondent. Prior to obtaining his clients signatures on engagement agreements, Mr. Cohen did not inform them about his status as an insurance agent who would collect a commission for the insurance products he sold in the guise of financial planning. In the engagement agreements, he failed to include the required language advising clients that they did not need to purchase insurance products when they engaged his services. [OTSC Exhibits E-F]. He failed to follow the advertised guidelines of a certified senior advisor requiring honesty and integrity. These actions lead to a finding that Mr. Cohen violated the insurance law at 40 P.S. § 625-3 and a penalty will be imposed for this violation.

In Count Two of the OTSC the Department charges that Mr. Cohen violated 40 P.S. § 310.11(2) which prohibits an insurance producer from violating Pennsylvania Insurance laws. The Department seeks a penalty for this Count on the basis that when Mr. Cohen violated the insurance law at 40 P.S. § 625-3 he also violated 40 P.S. § 310.11(2). However, the actions resulting in a penalty under Count One are identical to those which form the basis for the Count Two charge and a separate penalty will not be imposed for Count Two.

When Mr. Cohen collected fees for the Sage Scholars Program he did so while knowing that the program was designed to offer free tuition rewards to his clients. He had signed an agreement not to sell such tuition rewards. Nevertheless, he sold the

rewards to three of his clients. In so doing he violated 40 P.S. § 310.11(4) which prohibits the improper withholding or misappropriation of funds received in the course of doing business. Consequently a separate penalty will be imposed under Count Three of the OTSC.

Taken all together, Mr. Cohen's actions demonstrated incompetence, financial irresponsibility, untrustworthiness and a lack of general fitness in the course of doing business in Pennsylvania. These actions violated 40 P.S. § 310.11(7) and (20). A single penalty will be imposed for Counts Four and Five collectively for the violation of these provisions.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by the respondent's conduct. 40 P.S. § 310.91; 40 P.S. § 625-10. Each action violating a provision specified in sections 625-3 and 310.11 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2) and 625-10(2). The remedial actions specified in 40 P.S. § 625-10 may be imposed in addition to remedies specified in any other statute. 40 P.S. § 625-10. Section 310.91 also authorizes imposition of other appropriate remedies. 40 P.S. § 310.91(4).

A Commissioner is given broad discretion in imposing penalties. *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d at 523, 528 (Pa. Cmwlth. 1995). The dishonest and misleading conduct in the present case is of the most serious nature, connected directly to Mr. Cohen's duties as an insurance producer. Particularly troubling is his dishonesty while

dealing with the vulnerable senior citizen population. This seriousness is reflected in the penalties imposed. Mr. Cohen's infliction of financial harm on others evidences a moral turpitude which is antithetical to the trustworthiness required in the profession. By definition, insurance producers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the producer, and rely upon the producer's integrity. This is even more critical when the producer holds himself out as a financial planning professional offering advice to senior citizens.

In 2007 while Mr. Cohen purported to guide senior citizens in developing financial and estate plans he hid the actual nature of his business as an insurance salesperson collecting commissions on the products he sold them while also charging a fee for financial advice. He failed to advise them that they were not required to purchase insurance products from him. He collected fees for a tuition rewards program which he had agreed in writing to provide without cost to his clients.

A producer who has this recently inflicted financial harm upon others is incapable of the trust necessary in the profession. Simply put, Mr. Cohen at this time cannot be trusted with the pocketbooks, bank accounts and personal information of his customers. Mr. Cohen has offered no evidence to mitigate the seriousness of the violations.

The Department in its Order to Show Cause requests a finding that Mr. Cohen has violated five sections of the Insurance Act, that he be ordered to cease and desist from violating the insurance laws, that he pay restitution to his clients, that his license be revoked, that he be barred from future licensure, that he pay a maximum civil penalty of \$5,000.00 per violation and that other appropriate relief be ordered. In its motion for default judgment, the Department requests entry of an order entering default judgment against Mr. Cohen, deeming all relevant facts in the OTSC admitted and admitting the

authenticity of the OTSC exhibits. The Department also reiterates the requests for relief found in the OTSC, except that it does not seek the maximum civil penalty per violation.

Considering the facts in this matter, the applicable law, the seriousness of the conduct and all aggravating and mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.

2. The Commissioner may revoke or suspend a certificate or license upon finding that an insurance producer has violated provisions of the Insurance Act relating to unfair financial planning practices and that a producer has engaged in conduct which would disqualify the producer from initial issuance of a certificate or a license.

3. Unworthiness to hold a license may be established by a producer's failure to comply with laws which require an insurance producer timely to disclose his status as an insurance salesperson when offering financial planning services, or to inform his clients that they are not required to purchase insurance products in order to obtain his financial planning services, or by misappropriating client funds.

4. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the producer's conduct as well as mitigating and aggravating factors.

5. Producers are held to a high degree of professionalism and must exercise good judgment.

6. Producers on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for the laws which protect those consumers.

7. Jay A. Cohen by his conduct demonstrates current unworthiness to hold an

insurance license.

8. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
: Sections of the Insurance
Jay A. Cohen : Department Act of 1921, P.L.
317 Williams Road : 789, No. 285, *as amended* (40
Bryn Mawr, PA 19010-1213 : P.S. §§ 310.11(2),(4), (7) and
Respondent : (20); 40 P.S. § 625-3)
: :
: Docket No. SC10-08-013

ORDER

AND NOW, based upon the foregoing findings of fact, discussion and conclusions of law, it is **ORDERED** as follows:

1. Jay A. Cohen shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of Jay A. Cohen **ARE REVOKED** for a minimum of **five (5) years** pursuant to 40 P.S. § 625-10 for Counts One and Two collectively, a minimum of **three (3) years** pursuant to 40 P.S. § 310.91 for Count Three, and a minimum of **two (2) years** pursuant to 40 P.S. § 310.91 collectively for Counts Four and Five, with these revocations to run consecutively with each other for a total minimum period of **ten (10) years**. Additionally, Jay A. Cohen is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of ten (10) years. Jay A. Cohen is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of ten (10) years.

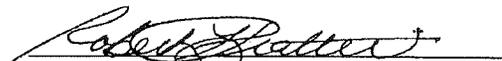
3. Jay A. Cohen shall pay restitution as follows: To Theodore and Muriel Seabrook, \$2,738.00; to Robert and Gloria Meyers, \$5,267.00; and to Maryanne Torone, \$5,088.00 for a total of \$13,093.00. Payment payable to each client must be made by certified check or money order within thirty (30) days of the date of this Order and must provide proof of payment or restitution agreement to the Insurance Department directed to Sharon L. Fraser, Office Manager, Bureau of Licensing and Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said restitution is paid in full.

4. In addition, Jay A. Cohen shall pay a civil penalty to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

- a. Counts One and Two: \$5,000.00
- b. Count Three: \$3,000.00
- c. Counts Four and Five: \$2,000.00

for a total of ten thousand dollars (\$10,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Fraser, Administrative Assistant, Bureau of Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

5. This order is effective immediately.


ROBERT L. PRATTER
Acting Insurance Commissioner